

Nos. A07-417 and A07-418

STATE OF MINNESOTA
IN COURT OF APPEALS

BNSF Railway Company,
Respondent/Appellant (A07-417),
and

Twin Cities & Western Railroad Company,
Respondent/Appellant (A07-418)

vs.

City of Granite Falls,
Petitioner/Respondent.

BRIEF & ADDENDUM OF RESPONDENT

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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LEGAL ISSUES

1. Does Minn. Stat. § 117.036 apply to this condemnation proceeding?

The trial court did not make a specific ruling on this issue, but appeared to proceed as if it did.

Most apposite cases, constitutional provisions and statutes:

Minn. Stat. § 117.036 (2005).

2. Does Minn. Stat. § 117.036 require dismissal of the condemnation proceeding?

The trial court found that by obtaining an appraisal before the condemnation was finalized and prior to the commissioner's assessment of the land, Respondent (Petitioner below) City of Granite Falls had committed harmless error that did not change the outcome of the case.

Most apposite cases, constitutional provisions and statutes:

City of Minneapolis v. Wurtele, 291 N.W.2d 386 (Minn. 1980).

3. Was the condemnation of the easement necessary?

The trial court determined that the condemnation was necessary.

Most apposite cases, constitutional provisions and statutes:

Housing and Redevelopment Authority in and for the City of Richfield v. Walser Auto Sales, Inc., 630 N.W.2d 662 (Minn. Ct. App. 2007).

Lundell v. Cooperative Power Association, 707 N.W.2d 376 (Minn. 2006).

City of Minneapolis v. Wurtele, 291 N.W.2d 386 (Minn. 1980).

Minn. Stat. § 85.015, Subd. 22.

4. Was the condemnation for a proper municipal purpose?

The trial court determined that the condemnation was for a proper municipal purpose.

Most apposite cases, constitutional provisions and statutes:

Minn. Stat. § 117.016, Subd. 1

Minn. Stat. § 465.01

5. **Did the trial court err when it denied BNSF’s Motion for Summary Judgment on the question of whether the description of the property to be taken was fatally defective?**

The trial court determined that the City had substantially complied with the legal description requirement.

City of Minneapolis v. Wurtele, 291 N.W.2d 386 (Minn. 1980).

6. **Did the trial court err when it issued its Order without granting additional time for discovery and conducting an evidentiary hearing?**

After denying the Motions for Summary Judgment of BNSF and TCW, the trial court granted their alternative request for relief and converted the matter to a “non-quick-take” condemnation proceeding.

Most apposite cases, constitutional provisions and statutes:

Minn. Stat. § 117.042.

STATEMENT OF THE CASE

Respondent City of Granite Falls (hereinafter “CITY”) accepts the Statement of the Case as set forth by Appellants, with the exception of the argument found in the last sentence of the Statement of the Case, found on page 6 of the Brief of Appellant (Respondent below) BNSF Railway Company (hereinafter “BNSF”), and the argument found in Footnote 1 on page 3 of the Brief of Appellant (Respondent below) Twin Cities & Western Railroad Company (hereinafter “TCW”).

STATEMENT OF FACTS

The City seeks the condemnation of an easement over certain land located in Chippewa County, Minnesota for the purpose of establishing a recreational trail. Appellants' Appendix (hereinafter "AA"), page 54. Appellants BNSF and TCW are the owners of land over which the easement is sought. Id. Feasibility studies for the proposed trail route have been conducted, and a preliminary engineering study of the property has determined that the route proposed is feasible. Id. The City initiated condemnation proceedings following the consideration of these reports. AA57. The purpose of the condemnation was to acquire the property and then turn it over to the State to be developed as a recreational trail. AA54.

After commencing the condemnation proceeding, but before commissioners assessed the land, the City obtained an appraisal on the property and provided it to the Parties and to the Court. AA60. The City attempted to negotiate with TCW prior to the commencement of the action, but TCW flatly refused to agree to any proposal the City could offer. Trial Transcript (hereinafter "TT"), page 20, lines 12-17; see also Affidavits of Dorian Grilley, and Affidavit of Geoffrey Hathaway, paragraph 15, both contained in the Record herein. The City only sought to obtain an easement to cross BNSF tracks on an already-existing public crossing, with no loss of value to BNSF, so it did not believe negotiations were necessary with BNSF. TT 20, lines 3-10.

STANDARD OF REVIEW

Issues of statutory construction are subject to de novo review. Scott v. Minneapolis

Police Relief Ass'n, Inc., 615 N.W.2d 66, 70 (Minn. 2000). Determinations of public purpose and necessity are treated as questions of fact for the trial court and will not be reversed unless clearly erroneous. State by Humphrey v. Byers, 545 N.W.2d 669, 672 (Minn. Ct.App. 1996) (citing State v. Ohman, 116 N.W.2d 101, 104 (Minn. 1962)). When reviewing an order arising from a motion for summary judgment, the appellate court applies the de novo standard of review. STAR Centers, Inc. v. Faegre & Benson, L.L.P., 644 N.W.2d 72, 76 (Minn. 2002). “A district court's decision to deny a motion for a continuance to conduct discovery is reviewed under an abuse-of-discretion standard.” Alliance for Metropolitan Stability v. Metropolitan Council, 671 N.W.2d 905, 919 (Minn. Ct. App. 2003).

ARGUMENT

1. Does Minn. Stat. § 117.036 apply to this condemnation proceeding?

Minn. Stat. §117.036, subd. 1 (2005) provides in pertinent part: “This section applies to the acquisition of property for **public highways, streets, roads, alleys, airports, mass transit facilities, or other transportation facilities or purposes.**” (Emphasis added). If the meaning of a statute is clear, it shall be given effect according to the plain meaning of the words used. Minn. Stat. §645.08(1); Molloy v. Meier, 679 N.W.2d 711, 723 (Minn. 2004). The plain meaning of the version of Minn. Stat. § 117.036 in effect at the time this matter commenced was to regulate condemnation actions involving property sought for use for public mass transportation purposes. The statute does not apply to the condemnation petition, which seeks easements for a recreational trail.

Appellants cite State by Washington Wildlife Preservation, Inc. v. State, 329 N.W.2d 543 (Minn. 1983) in support of their proposition that Minn. Stat. § 117.036 (2005) applies to this proceeding. There, the Court preserved the ability of the State to establish a recreational trail over an abandoned rail line. Id at 547. While this demonstrates the public policy in favor of the establishment of the trail, it does not resolve the issue. Washington Wildlife did not address the application of Minn. Stat. § 117.036 (2005) to a recreational trail.

The purpose of Minn. Stat. § 117.036 (2005) is to regulate “the acquisition of property for public highways, streets, roads, alleys, airports, mass transit facilities, or for other transportation facilities or purposes.” The proposed trail does not fall within the scope of this statute. It is not a public highway, street, road, alley, airport, or mass transit facility. The category “other transportation facilities or purposes” should not be interpreted to include a recreational trail which is NOT related to any of the other specifically indicated items. To do so could put ANY proposed project of a municipality within the scope of this law, which is not within its plain meaning. If the statute were interpreted as broadly as Appellants would like, a municipality condemning blighted or contaminated property could be forced to negotiate with its owners if there was a sidewalk on the property. Since the statute in effect at the time this proceeding commenced does not apply, the City was not required to negotiate or provide an appraisal.

2. Does Minn. Stat. § 117.036 require dismissal of the condemnation proceeding?

The trial court found that by obtaining an appraisal before the condemnation was finalized and prior to the commissioner’s assessment of the land, the city had committed

harmless error that did not change the outcome of the case and determined that dismissal was not warranted under Minn. Stat. § 117.036. AA60. The Court in City of Minneapolis v. Wurtele noted that technical defects in compliance with a statute should not be used to overturn governmental action when the defects “do not reflect bad faith, undermine the purpose of the procedures, or prejudice the rights of those intended to be protected by the procedures.” 291 N.W.2d 386, 391 (Minn. 1980).

To the extent that the statute applies to this matter, the City has substantially complied with its requirements and remedied any defects. Negotiations with TCW were attempted, but were not fruitful. TT20, lines 12-17; see also Affidavits of Dorian Grilley, and Affidavit of Geoffrey Hathaway, paragraph 15. The City did not negotiate with BNSF, but such was not necessary because the property sought was already a public crossing. TT 20, lines 3-10. There was no reason to negotiate for a right that was already in place for the public to use. Further, both TCW and BNSF have made it quite clear that they would not, at least at the early stages of this proceeding, have agreed to allow the easement. See TT, page 24, line 12 to page 25, line 9. When an otherwise statutorily required action serves no useful purpose, it will not be required. Alevisos v. Metropolitan Airports Commission of Minneapolis and St. Paul, 216 N.W.2d 651, 667 (Minn. 1974).

The City did, in fact, obtain an appraisal prior the trial court’s determination of this issue. Further, Appellants BNSF and TCW were not prejudiced by the lack of an appraisal. They are attempting to derail the condemnation proceeding on this technical defect, but they are in fact concentrating their attack not on the amount their property would be worth, but rather on the impact of the trail on their respective rail lines. Given the fact that this matter

has been converted to a standard condemnation proceeding, and the City will not acquire possession until after the commissioner's valuation, the late filing of the appraisal has not had a detrimental impact on Appellants.

Subject matter jurisdiction is vested in the Court upon the presenting and filing of the petition and accordingly any procedural irregularities do not divest the Court of subject matter jurisdiction. Housing and Redevelopment Authority ex rel City of Richfield vs. Adelmann, 590 N.W.2d 327, 336 (Minn. 1999) (Justice Paul H. Anderson, specially concurring).

It is generally said that, where the provisions of statute do not relate to the essence of the thing to be done, are incidental or subsidiary to the chief purpose of the law, are not designed for the protection of third persons, and do not declare the consequences of the failure of compliance, the statute will ordinarily be construed as directory and not as mandatory. Where no substantial rights depend on compliance with the particular provisions and no injury can result from ignoring them and where, as here, the legislative intent can be accomplished in a manner other than as prescribed with substantially the same results, the provision is directory.

State by Lord v. Frisby, 108 N.W.2d 769, 773 (Minn. 1961).

The negotiation and appraisal provisions of Minn. Stat. § 117.036 do not relate to the essence of the foreclosure proceeding, the taking of the property. Attempts at negotiation would have accomplished nothing, even though they were attempted in the case of TCW. The value of the property, whether taken in a quick-take proceeding or not, is not arbitrarily set by the appraisal of the foreclosing party. The statute makes no reference to the consequences of failing to obtain the appraisal or conducting negotiations. Since BNSF and TCW have made it clear that they would not have agreed to the easement, it cannot be said

that their substantial rights depended on strict compliance with the appraisal and negotiation requirements.

Appellants claim that the appraisal and negotiation requirements are jurisdictional. BNSF cites Minnesota authority which is distinguishable. Land O'Lakes Dairy Co. v. County of Douglas, 31 N.W.2d 474, 475 (Minn. 1948) specifically states the penalty for failure to comply with a statute is dismissal – an element not present in Minn. Stat. § 117.036. State v. Radosevich, 82 N.W.2d 70, 72 (Minn. 1957) addressed the time for an appeal of the commissioner's report, not the validity of the petition to condemn the land. There, the Court construed the language of the statute to allow an appeal of 3 separate awards under one notice of appeal, even though the statute on its face did not appear to grant this right. Id at 74. The decision in City of Austin v. Wright 114 N.W.2d 584 (Minn. 1962), also addressed the time for appealing a commissioner's report, not the petition process itself. These are separate, distinguishable issues. The time for filing an appeal of a commissioner's report has been specifically found to be mandatory. City of Austin, 114 N.W.2d at 589. As noted in Adelman, jurisdiction over the Petition is acquired upon its filing. 590 N.W.2d at 336. Any defects in the process can be remedied if they do not prejudice the other parties. Frisby, 108 N.W.2d at 773. The authority cited by BNSF is not controlling on this issue.

TCW has cited authority from other jurisdictions suggesting that failure to negotiate warrants dismissal on jurisdictional grounds. As an initial observation, these authorities are not controlling. Further the Colorado case cited by TCW has been reversed on the ground that failure to negotiate in a condemnation proceeding could be excused if the negotiations

would be futile. Board of County Commissioners of County of Jefferson v. Auslander, 745 P.2d 999, 1001-1002 (Colo. 1987). In fact, it has since been determined by Colorado that negotiations are NOT a jurisdictional requirement, but rather an element of the claim for relief. Minto v. Lambert, 870 P.2d 572, 576 (Colo. Ct. App. 1993). Other jurisdictions have also indicated that if negotiations would be futile, they will not be required. State v. Hurliman, 368 P.2d 724, 731 (Or. 1962); U.S. Department of Interior v. 16.03 Acres of Land, More or Less, Located in Rutland County, Vermont, 26 F.3d 349, 359 (C.A.2 (Vt. 1994) ; City of Columbia v. Baurichter, 713 S.W.2d 263, 266 (Mo. Ct. App. 1986).

The appraisal and negotiation requirements of Minn. Stat. §117.036 are not jurisdictional, and even if they were, the City has substantially complied with them. The trial court properly determined that dismissal based on Minn. Stat. §117.036 is not warranted.

3. Was the condemnation of the easement necessary?

The trial court determined that the taking was reasonably necessary. “Absolute necessity is not required for a finding of public purpose, rather it is enough to find that the proposed taking is reasonably necessary or convenient for the furtherance of a proper purpose.” Housing and Redevelopment Authority in and for the City of Richfield v. Walser Auto Sales, Inc., 630 N.W.2d 662, 669 (Minn. Ct. App. 2007). A municipality’s determination of necessity are considered legislative actions, and will overturned only when they are “manifestly arbitrary or unreasonable.” Lundell v. Cooperative Power Association, 707 N.W.2d 376 (Minn. 2006) (citations omitted). Cities are authorized to condemn

property and turn it over to others as long as the condemnation serves a public purpose. See City of Duluth v. State, 390 N.W.2d 757, 763-64 (Minn. 1986).

The City considered surveys and studies, and had many discussions with state agencies and authorities regarding the proposed recreational trail. AA21, 54, 57. The City determined that the trail would add to its retail economic development, would help it attract new businesses, and induce existing businesses and its young people to stay in the community. AA 21-22. It authorized the acquisition of the property for the purpose of conveying it to the State for the construction of the trail. AA 23. The trail project was authorized by Minn. Stat. § 85.015, Subd. 22. It cannot be said that the City's decision was arbitrary.

The necessity for the condemnation need not exist at the exact time of the taking-necessity can also be based upon a need in the future. Chicago Great Western Railway Company v. Jesse, 82 N.W.2d 227, 232 (Minn. 1957).

Appellants have suggested that the condemnation is not necessary because its purpose is "speculative." An analysis of the "speculative" nature of the project is on whether it is reasonably necessary to condemn the land in order to accomplish the condemning authority's purpose, not whether the authority will actually be able to accomplish that purpose. Itasca County v. Carpenter, 602 N.W.2d 887, 890 (Minn. Ct. App. 1999). As long as there is a plan in place, and the condemnation is reasonably necessary to accomplish the public purpose set out in the plan, the condemnation is neither arbitrary or capricious. Id at 891. To hold otherwise would enmesh the courts in an endless series of reviews of the practicability of executive and legislative plans and decisions and would be

contrary to well-settled principles of eminent domain.” Id. The trail is not speculative – it has been specifically authorized by Minn. Stat. § 85.015, Subd. 22. Considerable effort has gone into the preparation and planning of the particular segment of the trail at issue in this lawsuit. See, generally Affidavit of Hathaway; see also AA21-22.

Condemnation is proper even if the condemning authority’s plan is not yet final and funding for the plan has not been allocated. City of Minneapolis v. Wurtele, 291 N.W.2d 386, 394-395 (Minn. 1980); see also Housing and Redevelopment Authority of the City of Saint Paul v. Exxonmobil Oil Corp., 2006 WL 997699 *6 (Minn. Ct. App. 2006) (unpublished decision, a copy of which is submitted herewith at Respondent’s Addendum (hereinafter “RA”), page 1). While the legislature may not have set aside complete funding for the plan, this should not be misread. It is good fiscal practice to only spend the public’s tax dollars as needed, and not to set aside large amounts of public funds before the property on which they will be spent has actually be acquired.

Appellants rely on Regents of University of Minnesota v. Chicago and Northwestern Transportation Co., 552 N.W.2d 578 (Minn. Ct. App. 1996) in support of their position on this issue. However, the Court in Carpenter, 602 N.W.2d at 890 noted that “[t]he rule established in Regents...is limited by the extreme facts present in that controversy and has no application here” – where there is a plan in place. Regents dealt with stockpiling for an undetermined use, not acquiring land for an articulated purpose such as a recreational trail, and therefore does not control this matter. See Regents, 552 N.W.2d at 580; see also Carpenter, 602 N.W.2d at 890.

TCW also contends that the City must show that the condemnation will not be inconsistent with its use, or materially interfere with, injure or defeat the public use by the railroad. In fact, it is the railroad's burden to establish inconsistency of or interference with use. Matter of Suburban Hennepin Regional Park District, 561 N.W.2d 195, 197 (Minn. Ct. App. 1997). TCW has not met its burden. TCW can point to nothing specific, and has merely presented a "parade of horrors" that may never occur in support of its position. Mere inconvenience, including congestion due to crossing over railroad property; rearranging tracks; increased risk of danger; and removal of structures are not sufficient to establish inconsistent use. Suburban Hennepin, 561 N.W.2d at 197. The Court in Suburban Hennepin held that, as a matter of law, a recreational trail will not substantially interfere with the railroad's right of way when there has been no allegation that the proposed use would render the railroad's operations impossible. Id. No such allegations have been made in this case, and therefore pursuant to Suburban Hennepin, the condemnation should be allowed.

Once the condemnation is complete, the next phase of the project will begin, including final engineering for the specific route available. TT92-93. The City's condemnation Petition specifically prohibits the easement sought from interfering with the safe and orderly operation of the railroads. AA5, paragraph 5. It does not seek permission to construct the recreational path without due regard for TCW's use of the rail line. Id. The trial court properly denied the motion for summary judgment on the ground of necessity.

4. Was the condemnation for a proper municipal purpose?

The trial court determined that the condemnation was for a proper municipal purpose. That determination should not be disturbed. Taking land for a scenic byway or a park has long been held to be a valid public purpose. Rindge Co. v. Los Angeles County, 262 U.S. 700, 707-708 (1923); Booth v. City of Minneapolis, 203 N.W. 625, 626 (Minn. 1925). The taking is also within the scope of the City's powers. Cities are empowered to acquire property "within or without their corporate limits". Minn. Stat. § 465.01. Upon condemning a parcel of property, the condemnor may turn the land over to another entity, as long as the transfer furthers the public purpose. City of Duluth, 390 N.W.2d at 763. The trial court correctly determined that Minn. Stat. § 117.016, Subd. 1 supports the acquisition of land by eminent domain by the City for the purpose of creating a recreational trail, then turning the land over to the State for completion of the project.

Appellants rely heavily on an Opinion of the Minnesota Attorney General from 1958 for their contention that the acquisition of land was not for a proper municipal purpose. As an initial observation, this authority is not controlling. The attorney general is not a jurist, and the attorney general's opinions are not the result of litigation in which all interested parties are allowed to present their arguments. Attorney General Opinions are simply one entity's interpretation of the law, and should be given no more deference than a memorandum of law produced by a reputable law firm. Further, the status of Minnesota law has evolved since then to encompass the conveyance of property taken by eminent domain by one governmental unit to another, as evidenced by Minn. Stat. § 117.016, Subd.

1.

The City seeks to condemn land for a multi – user trail outside of its municipal limits. This is a purpose authorized by law. The City may then turn the land over to the State to complete the project, just as the land could be turned over to a private developer. See City of Duluth, 390 N.W.2d at 763. Minn. Stat. § 465.025, authorizing the conveyance of lands held in fee simple from a municipality to the State, supports this proposition. The State should not be held to a different standard than a private developer on this issue.

TCW also suggests that the condemnation should not be allowed because it seeks to accomplish what the State cannot. While there is nothing in Minn. Stat. §85.015 specifically authorizing the state to acquire property by its own eminent domain rights, there is also nothing barring the state from acquiring property from an entity such as the City which has acquired the property by eminent domain. This approach is used in many state projects, forcing the local municipalities to shoulder some of the burden of moving a project forward. This does not restrict the City from using its eminent domain powers, as long as it has done so for a proper municipal purpose.

The taking serves a proper public purpose that can be accomplished by the City. Summary judgment for Appellants was properly denied on the issue of proper municipal purpose.

5. Did the trial court err when it denied BNSF’s Motion for Summary Judgment on the question of whether the description of the property to be taken was fatally defective?

The doctrine of “substantial compliance” has been recognized in the context of condemnation proceedings when faced with technical defects that do not reflect “bad faith, undermine the purpose of the procedures, or prejudice the rights of those intended to be

protected by the procedures.” Wurtele, 291 N.W.2d. at 391. The description of the BNSF property put all concerned parties on adequate notice of the property to be taken. See AA59. Any defect in the legal description regarding the reference to the township road could be corrected prior to final entry of an Order awarding the City the land. Frisby, 108 N.W.2d at 773. Other jurisdictions have determined that a legal description that would enable a party familiar with the area to locate the condemned property is sufficient for an eminent domain proceeding. Hurliman, 368 P.2d at 728; Yakima County v. Evans, 143 P3d 891, 894 (Wash. Ct. App. Div. 3, 2006). The trial court properly denied summary judgment on this issue.

6. Did the trial court err when it issued its Order without granting additional time for discovery and conducting an evidentiary hearing?

The trial court denied the motions of BNSF and TCW for Summary Judgment, but granted them the alternative relief they had requested – conversion of the matter to a standard condemnation proceeding. AA55. There was no longer a trial date set – it had been stricken from the calendar. AA51-52. That order striking the trial date was not challenged, nor was there any motion to reset the trial date. In fact, since the matter is now a standard condemnation proceeding, there will be an opportunity for Appellants to address their concerns following the commissioner’s report. See Walser, 641 N.W.2d at 890. Further, when, as in this case, there has been no showing that the recreational trail will render the railroad’s operations impossible, an evidentiary hearing is not warranted. Suburban Hennepin, 561 N.W.2d at 197-198. Appellants’ argument on the denial of an evidentiary hearing is without merit.

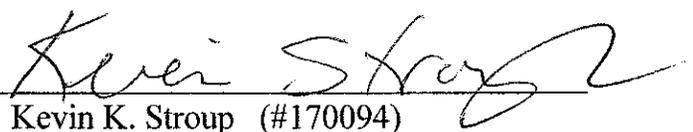
Appellants' argument regarding discovery is also unfounded. Appellants did, in fact, conduct discovery prior to their summary judgment motion. AA 33-35; AA36-40; AA41-44. Appellants retain their rights to appeal the final commissioner's report. See Walser, 641 N.W.2d at 890. In light of the change of posture to a non-quick-take proceeding, the burden is now on them to actually make discovery requests, which they are already authorized to do. See State by Mattson v. Boening, 149 N.W.2d 87, 92 (Minn. 1967). There has been no error by the trial court on this issue.

CONCLUSION

Appellants have provided no basis for overturning the decision of the trial court. Therefore, Respondent City of Granite Falls respectfully requests that the decisions of the Trial Court be affirmed.

Dated this 29th day of June, 2007.

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